No. 83-183

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

LTV FEDERAL CREDIT UNION,
*Petitioner,*
v.
UMIC GOVERNMENT SECURITIES, INC., and
BANCO DE LA NACION ARGENTINA,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF OF THE RESPONDENTS IN OPPOSITION

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## COUNTER STATEMENT OF QUESTIONS PRESENTED

Whether, because of recent amendments to the federal securities laws which include puts and options on securities within the statutory definition of a "security", this Court should determine if puts and options on securities fell within the statutory definition of a "security" prior to the amendments.

Whether the decision of the Court of Appeals in declining to apply retroactively recent amendments to the federal securities laws to the June 28, 1978 Standby Commitment affords petitioner any basis for review on writ of certiorari.

Whether the Court of Appeals decision that UMIC was not an unregistered "exchange" affords petitioner any basis for review on writ of certiorari.

Whether the Court of Appeals holding that the broad powers given to federal credit unions under the Federal Credit Union Act gave petitioner the power to enter into the contract in question affords petitioner any basis for review on writ of certiorari.

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## BRIEF OF THE RESPONDENTS IN OPPOSITION

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### COUNTER STATEMENT OF THE CASE

#### A. Proceedings and Disposition in the Courts Below.

This suit was filed by LTV Federal Credit Union ("LTV") on June 24, 1980, in the United States District Court for the Northern District of Texas, Dallas Division. LTV sought a declaratory judgment to sanction its unilateral breach of a standby commitment agreement ("Standby Commitment") to purchase $4 million Government National Mortgage Association certificates ("GNMAs") from UMIC Government Securities, Inc. ("UMIC"). One day later UMIC filed a complaint for breach of contract and securities fraud against LTV and certain of its directors. Later Banco de la Nacion Argentina ("Banco") was joined as a plaintiff and counter-complainant with UMIC. The cases were consolidated and tried without a

jury. The District Court (Patrick E. Higginbotham, J.) found that LTV's breach of the Standby Commitment was intentional and that LTV was liable in damages to UMIC and Banco for breach of contract in the aggregate amount of $1,525,647.91.

In the District Court LTV raised "a fistful of arguments to justify its contention that the contract was not enforceable" (App. p. A-17),[1] all of which were rejected by the court. Among its defenses, LTV claimed that the Standby Commitment was an unregistered "security" within the meaning of the Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.*; that UMIC violated the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*, by acting as an unregistered "exchange"; and that LTV was not authorized by the Federal Credit Union Act, 12 U.S.C. §§ 1751 *et seq.*, to enter into the Standby Commitment. These same contentions were made in the Court of Appeals, were rejected, and are again raised in LTV's Petition to this Court.

The Court of Appeals held that the findings of fact and conclusions of law of the District Court were proper and the Court of Appeals adopted the District Court's opinion with some slight amplification on one issue. This amplification was due to the fact that during the period of time the case was on appeal the federal securities laws were amended expressly to include, *inter alia*, options on securities within the definition of a "security." In affirming the District Court, the Court of Appeals held that these amendments should not be applied retroactively in this case.

**B. Nature of the Case.**

On June 26, 1978, LTV, a federal credit union with its principal place of business in Texas, and UMIC, a Tennessee corporation organized for the purpose of trans-

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[1] References to Petitioner's Petition For A Writ Of Certiorari are made by "Pet. p. —"; references to the Appendix to Petitioner's Petition For A Writ Of Certiorari are made by "App. p. —".

acting business in government securities, entered into a contract, described as a Standby Commitment, whereby in return for a $200,000 non-refundable commitment fee, LTV, upon twenty days notice, was obliged to take delivery and pay for on June 22, 1980, certain Government National Mortgage Association certificates (GNMAs). During the approximate two-year duration of the Standby Commitment, the market value of the GNMAs declined. UMIC gave timely written notice to LTV that it would deliver the GNMAs pursuant to the Standby Commitment; however, on June 17, 1980, LTV informed UMIC that it would not take delivery or pay for the GNMAs. One week later LTV filed its declaratory judgment action and this consolidated action was commenced.

**C. Facts in the Record Necessary to Understand the Issues.**

In its Petition (Pet. pp. 4-7) petitioner has made many statements of "fact" which are not only unsupported by the record but are also directly contrary to the findings of the District Court and the Court of Appeals.[2] Respondents reject petitioner's version of the underlying facts and, instead, adopt the findings of fact of the District Court and the Court of Appeals.

## SUMMARY OF ARGUMENT

The Court of Appeals decision affords petitioner no basis for review by this Court.

A. The issue of whether the Standby Commitment was a "security" under the federal securities laws when it was made in 1978 does not warrant this Court's review. The Standby Commitment was a purely private transaction between two private parties. Because the October 1982 amendments to the federal securities laws included puts and options within the literal definition of a federal "security" and changed the applicable law, there is no ele-

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[2] See p. 8 n.8, *infra*.

ment of public importance involved in this private transaction, nor would a decision of this Court serve to benefit the development of federal law. This Court should not, therefore, grant the Petition.

B. The Court of Appeals determination not to apply retroactively the 1982 amendments to the Standby Commitment (which was made in June 1978) was reached through a factual determination which, as this Court has often held, does not afford a basis for review by this Court.

C. The Court of Appeals determination that UMIC was not an "exchange" as defined by the Securities Exchange Act, 15 U.S.C. § 78c(a)(1), was also based on a factual determination which, again, affords petitioner no basis for review by this Court.

D. At the time the Standby Commitment was made the National Credit Union Administration ("NCUA") interpreted the National Credit Union Act as authorizing standby commitment agreements. When the NCUA adopted regulations in 1979, prohibiting certain standby commitment agreements, it expressly instructed credit unions such as petitioner to honor their outstanding standby commitment agreements. Petitioner has urged no valid basis for this Court's review of the lower courts' interpretation of the National Credit Union Act as authorizing the Standby Commitment.

## REASONS FOR DENYING THE PETITION

### A. Because of recent amendments to the federal securities laws which include puts and options on securities within the statutory definition of a "security", this Court should not determine if puts and options on securities fell within the statutory definition of a "security" prior to the amendments.

The Court should not grant petitioner's request to review the Court of Appeals determination that the Standby Commitment, when made, was not a "security" which was required to be registered under Section 5 of the Securi-

ties Act of 1933, 15 U.S.C. § 77e. Contrary to petitioner's assertions, there is neither an uncertainty within the circuits nor a need for a "definitive statement" from this Court regarding whether the Standby Commitment was a "security" in 1978, subject to registration. The Court of Appeals decision is entirely in accordance with the settled law and otherwise does not warrant this Court's consideration.

Initially, it is important to note that the question advanced by petitioner lacks public importance because on October 13, 1982, the federal securities laws were amended expressly to include, *inter alia*, puts and options on securities within the definition of a "security". Pub. L. No. 97-303, 96 Stat. 1409 (App. p. A-6). The issue of whether the Standby Commitment—a "purely private transaction between two private parties" (App. p. A-13) —was a federal "security" in June 1978, when it was made, simply does not merit consideration by this Court. *See, e.g., District of Columbia v. Sweeney*, 310 U.S. 631 (1940) (certiorari denied "in view of the fact that the tax is laid under a statute which has been repealed and the question is therefore not of public importance"); *Morris v. Weinberger*, 410 U.S. 422 (1973) (writ of certiorari dismissed as improvidently granted when Congress amended statute following grant of writ of certiorari).

Further, there is no split within the circuits as to whether a standby commitment agreement is a "security" subject to registration. Apart from the Court of Appeals in the instant case, the only other court of appeals that has considered the issue held squarely that a standby commitment agreement is not, itself, a security subject to registration. *Securities and Exchange Commission v. G. Weeks Securities, Inc.*, 678 F.2d 649, 652 (6th Cir. 1982).[3]

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[3] Prior to having its opinion vacated by this Court the Seventh Circuit reached a similar holding with respect to exchange traded

As to the three court of appeals decisions cited by petitioner for its "conflict within the circuits" claim, two are readily distinguishable[4] and the third, *Mansbach v. Prescott, Bell & Turben*, 598 F.2d 1017 (6th Cir. 1979), fails to stand for the proposition urged by Petitioner.[5] There is simply no conflict within the Courts of Appeals.

Finally, even if registration were required for pre-amendment option contracts covering the sale of GNMAs, parties such as petitioner would be afforded little, if any, additional protection under the federal securities laws. As noted by the Court of Appeals, petitioner failed to assert any "claim of real prejudice resulting from UMIC's failure to register the standby agreement as a

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options on GNMAs. *Board of Trade of the City of Chicago v. Securities and Exchange Commission*, 677 F.2d 1137, 1155-57 (7th Cir.), *vacated as moot*, —— U.S. ——, 103 S.Ct. 434, 74 L.Ed.2d 594 (1982).

[4] The loan commitment letter in *United States v. Austin*, 462 F.2d 724 (10th Cir.), *cert. denied*, 409 U.S. 1048 (1972), involved

> a large scale, advance-fee, loan swindle in which the defendants issued, along with false financial statements, not outright commitments, but back-up commitments guaranteeing the making of loans by others. Plaintiffs were induced to put up money by advertising and solicitation and no loans were ever made.

*McGovern Plaza Joint Venture v. First Denver Mortgage Investors*, 562 F.2d 645, 648 (10th Cir. 1977). And, apart from being distinguishable on its facts, in a subsequent decision holding that routine loan commitments are *not* securities, the Tenth Circuit limited *Austin* to its own facts. *McGovern Plaza*, 562 F.2d at 648.

The naked double options described in *Securities and Exchange Commission v. Commodity Options International, Inc.*, 553 F.2d 628 (9th Cir. 1977), also have no characteristics similar to the Standby Commitment; the instruments were merely a facade masking a classic investment contract under *Securities and Exchange Commission v. W. J. Howey Co.*, 328 U.S. 323 (1946).

[5] *Mansbach*, 598 F.2d at 1026 n.40, contains dicta to the effect that an option to sell stock is a separate security; however, in *Securities and Exchange Commission v. G. Weeks Securities, Inc.*, 678 F.2d 649, 652 (6th Cir. 1982), the Sixth Circuit expressly held that a standby commitment agreement was not a separate security.

security" (App. p. A-5 n.1). Moreover, because the standby commitment agreement involved the sale of GNMAs, which are "securities"—albeit exempt securities—LTV was afforded the full protection of the antifraud provisions of the securities laws such as Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder. *See International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 564 n.18 (1979); *Abrams v. Oppenheimer Government Securities, Inc.*, [Current Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,409 (N.D. Ill. Jan. 3, 1983); *Davidson v. Dean Witter Reynolds, Inc.*, 478 F. Supp. 494, 495 (D. Colo. 1979).

**B. The decision of the Court of Appeals in declining to apply retroactively recent amendments to the federal securities laws to the June 28, 1978 Standby Commitment affords petitioner no basis for review on writ of certiorari.**

Petitioner claims that in declining to apply retroactively the October 1982 amendments to the federal securities laws[6] to the June 20, 1978 Standby Commitment, the Court of Appeals decision "is directly in conflict with the consistent line of decisions from this Court for the last 182 years on the issue of retroactive application of statutory changes which occur during the pendency of direct review." (Pet. p. 15). To the contrary, the Court of Appeals decision is in complete accord with the directive of this Court in *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974):

> [A] court is to apply the law in effect at the time it renders its decision, *unless doing so would result in manifest injustice* or there is statutory direction or legislative history to the contrary.

(emphasis added). The Court of Appeals simply made a factual determination that the retroactive application of

[6] Pub. L. No. 97-303, 96 Stat. 1409.

the October 1982 amendments would result in "manifest injustice" in this case and, in accordance with the directive in *Bradley*, applied the law in effect at the time the Standby Commitment was made.[7]

In attacking the finding of the Court of Appeals that the retroactive application of the amendments would be manifestly unjust, and which would, in the opinion of the Court of Appeals, subject UMIC to "unforeseen, disastrous consequences" (App. p. A-16), petitioner charges that the Court of Appeals "incorrectly characterizes" certain facts in the record (Pet. p. 16).

Petitioner is attempting to re-litigate the facts in this Court; and, in doing so, continues to make statements of "fact" which are not only unsupported by the record but which are directly contrary to findings of the District Court and the Court of Appeals.[8] In any event, however,

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[7] The Court of Appeals also found that there was no direction in the legislation concerning its prospective or retroactive application (App. p. A-11).

[8] For example, petitioner claims that LTV's management was untrained and inexperienced in matters involving investments (Pet. p. 5) and was somehow misled by UMIC (Pet. pp. 5-6). The Court of Appeals, in adopting the findings of the District Court, expressly held to the contrary:

> First, the parties to this lawsuit are reasonably sophisticated parties, knowledgeable of financial transactions, who negotiated and entered a single contract. Each had entered similar contracts with other institutions and corporations, and the court below specifically found that each party to the contract understood the contents of the agreement and the method of its operation. There was no fraud involved in either the inducement or the execution of the agreement; the agreement was a legal contract, a purely private transaction between two private parties. Each party to the agreement hoped to profit from a change in the market, and this litigation sprang from LTV's realization that it would not so profit. Each party has been equally capable of prosecuting its respective claims in this court and the court below.

(App. pp. A-12-13)

this Court should not grant the petition simply to review the factual findings of the Court of Appeals. As stated in *National Labor Relation Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951):

> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fairminded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated.
>
> In such situations we should "adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit to different interpretations." Federal Trade Com. v. American Tobacco Co., 274 U.S. 543, 544, 71 L. Ed. 1193, 1194, 47 S. Ct. 663.

Petitioner also places some significance on the decision of this Court to vacate the Seventh Circuit's decision in *Board of Trade of the City of Chicago v. Securities and Exchange Commission*, 677 F.2d 1137 (5th Cir.), *vacated as moot*, —— U.S. ——, 103 S.Ct. 434, 74 L.Ed.2d 594 (1982) (Pet. p. 11). No inference should be drawn from the Court's action because *Board of Trade* was based on *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), which sets forth this Court's established practice in federal civil cases which become moot on appeal, of granting the petitions, reversing or vacating the judgments, and remanding the cases with directions to dismiss the petitions for review as moot. As was explained in *Munsingwear*:

> That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through

> happenstance. When that procedure is followed, the rights of all parties are preserved. . . .
>
> * * * *
>
> As already indicated it is commonly utilized in precisely this situation to prevent a judgment, unreviewable because of mootness, from spawning any legal consequence.

340 U.S. at 40-41.

The Court of Appeals determination not to apply retroactively the October 1982 amendments is neither in conflict with any decision of this Court nor of the decisions of any of the other circuits, and this Court should not grant the Petition merely to review the findings of fact on which the decision is based.

**C. The Court of Appeals decision that UMIC was not an unregistered "exchange" affords petitioner no basis for review on writ of certiorari.**

Petitioner contends that its Petition should be granted because the decision of the Court of Appeals is the first interpretation of the definition of the term "exchange" under the Securities Exchange Act,[9] and the decision has completely "emasculated the definition and straight forward criteria set forth therein." (Pet. p. 20).

Petitioner's claim represents an effort to re-try the facts and petitioner's version of the facts is in direct conflict with the findings of the District Court, as adopted by the Court of Appeals:

> This court does not agree that UMIC operates as an "exchange." UMIC does not use its facilities or

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[9] An exchange is defined in 15 U.S.C. § 78c(a)(1) as:

> any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.

> otherwise provide a marketplace for bringing together purchasers and sellers of securities. Nor does UMIC perform the functions commonly performed by a stock exchange.

(App. p. B-42).

The opinion of the District Court as adopted by the Court of Appeals simply found that a necessary element of an "exchange" is an agency relationship—a relationship which the proof showed was not involved in the case of UMIC and its operations (App. pp. B-42-43). The opinion is accordingly limited to the factual situation of this particular case, and presents no conflict with the decision of any other circuit. Again, this Court should not grant the Petition simply to review the findings of fact on which the decision is based. *National Labor Relation Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951).

**D. The Court of Appeals holding that the broad powers given to Federal Credit Unions under the Federal Credit Union Act gave petitioner the power to enter into the contract in question affords petitioner no basis for review on writ of certiorari.**

With little argument, and without citing any authority for its contention, petitioner seeks to have this Court overrule the holding of the Court of Appeals that under the Federal Credit Union Act, 12 U.S.C. §§ 1751 *et seq.*, Federal Credit Unions had the power to enter into standby commitment agreements.

The National Credit Union Administration ("NCUA"), the agency charged with the responsibility of administering the Federal Credit Union Act, recognized that prior to 1979 federal credit unions were authorized to enter into standby commitment agreements. In the District Court's opinion, which was adopted by the Court of Appeals, Judge Higginbotham acknowledged the stipulation that had been made by the parties prior to trial:

> The parties have stipulated that at the time the Standby Commitment was executed, the NCUA "interpreted the Federal Credit Union Act as authorizing Federal Credit Unions, such as LTV Credit Union, to enter into and consummate GNMA standby commitments."

(App. p. B-21).

Petitioner had previously entered into standby commitment agreements with other institutions and corporations. (App. p. A-13). Petitioner has offered no basis for disturbing the stipulation and the lower court's reading of the Federal Credit Union Act. The opinion of the Court of Appeals should not, therefore, be reviewed by this Court.

Petitioner also argues that the Court of Appeals erred in refusing to retroactively apply NCUA regulations prohibiting certain standby commitment agreements[10] after July 20, 1979—more than one year after the parties entered into the Standby Commitment. The regulations were clearly prospective in their application and, in fact, the NCUA urged federal credit unions to meet their outstanding standby commitment agreements. The NCUA stated:

> Some commenters expressed concern over whether the final rule would be applicable to the transactions entered into before its effective date. *The final rule is not retroactive and, therefore, does not affect transactions entered into prior to the effective date* [July 20, 1979].
>
> * * * *
>
> As a general rule, those Federal credit unions that have previously entered into a suitable commitment to purchase a security even if the commitment is not authorized under the final rule, *should meet that commitment.*

44 *Fed. Reg.* 42,676 (July 20, 1979) (emphasis added).

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[10] The regulations, 12 C.F.R. § 703.3, prohibited only certain standby commitment agreements. For example, federal credit unions were permitted to enter into standby commitment agreements for the purchase and sale of real estate loans, 12 C.F.R. § 703.3(a)(1).

The NCUA's prospective application of the July 1979 regulations was entirely proper and affords Petitioner no basis for review by this Court.

## CONCLUSION

As the Court of Appeals noted, this case involves "a purely private transaction between two private parties" (App. p. A-13). For the most part, the applicable law has changed since the Standby Commitment was made and, as is evident from the petition, most of petitioner's arguments focus on the facts surrounding the transaction, all of which have been exhaustively analyzed by the lower courts. Viewed against this background, any ultimate pronouncement on the issues by this Court would not serve to benefit the development of federal law or serve any public purpose. Respondents respectfully request the Petition be denied.

Respectfully submitted,

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